

IN THE DISTRICT COURT OF GUAM  
TERRITORY OF GUAM

\* \* \*

**FILED**  
DISTRICT COURT OF GUAM  
OCT 11 2006  
MARY L.M. MORAN  
CLERK OF COURT

UNITED STATES OF AMERICA,	)	<b>COURT OF APPEALS</b>
	)	<b>CASE NO. 06-</b>
Plaintiff,	)	
	)	
vs.	)	<b>CRIMINAL CASE</b>
	)	<b>NO. CR05-00053</b>
BRIAN WILLIAM ELM,	)	
	)	
Defendant.	)	
-----	)	

TRANSCRIPT OF PROCEEDINGS  
BEFORE  
THE HONORABLE JOHN C. COUGHENOUR  
Designated District Judge

**SENTENCING HEARING**  
**TUESDAY, OCTOBER 10, 2006**

US Attorney's Office  
Districts of Guam & NM

OCT 11 2006

Time 4:14

Wanda M. Miles  
Official Court Reporter  
District Court of Guam

**GOVERNMENT  
EXHIBIT**

**3**

**APPEARANCES:**

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ASSISTANT UNITED STATES ATTORNEY  
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FOR THE DEFENDANT: LAW OFFICES OF VAN DE VELD,  
SHIMIZU, CANTO & FISHER  
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Official Court Reporter  
District Court of Guam

1 HAGATNA, GUAM; TUESDAY, OCTOBER 10, 2006; 11:05 A.M.

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3 THE CLERK: Case number CR05-53, United States  
4 of America versus Brian William Elm.

5 Counsel, make your appearances.

6 MS. JOHNSON: Good morning, Your Honor, Karon  
7 Johnson for the United States, with Paul Griffith of  
8 DEA.

9 THE COURT: Ms. Johnson.

10 MR. VAN DE VELD: Good morning, Your Honor,  
11 Curtis Van de Veld on behalf of the defendant, Brian  
12 Elm, who's to my immediate right.

13 THE COURT: Mr. Van de Veld.

14 Mr. Elm, have you had an opportunity to review  
15 and comment on the presentence report?

16 THE DEFENDANT: Yes, Your Honor.

17 THE COURT: All right. Mr. Van de Veld, do  
18 you wish to be heard?

19 MR. VAN DE VELD: Yes, Your Honor. Your  
20 Honor, do you want me to give all my comments both as  
21 to what the ultimate sentence should be as well as my  
22 position on the PSR, all at one time?

23 THE COURT: Sure.

24 MR. VAN DE VELD: Okay. Thank you for coming  
25 back for the sentencing. It's important to Mr. Elm

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1 that you be here to decide some of these issues because  
2 the presentence report recites essentially all of the  
3 facts that essentially were a part of the basis of the  
4 charges that were presented to the jury. And only  
5 because of the fact that you sat through the trial are  
6 you in the position to be able to understand why it is  
7 that the jury's verdicts don't support the offense  
8 conduct as included in the presentence report.

9 THE COURT: Now, in that regard, let me ask  
10 you the question. In your sentencing memorandum you  
11 make reference to the three ranges in the verdict, the  
12 jury having seized upon the middle range.

13 MR. VAN DE VELD: Yes, Your Honor.

14 THE COURT: Which was, as I understand it, 10  
15 to 50 grams; not less than 10, nor more than 50.

16 MR. VAN DE VELD: I recall it as being five,  
17 more than five -- more than five grams -- five grams or  
18 more, but less than 50.

19 THE COURT: Less than 15?

20 MR. VAN DE VELD: 50.

21 THE COURT: Is it five to 50?

22 MS. JOHNSON: Five-zero.

23 THE COURT: Okay, I understand that. And you  
24 say that the court should assume that it was five grams  
25 at least, which would give a base offense level of 26.

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1 If the court assumed that it was 50 grams, what would  
2 that do to the base offense level?

3 MR. VAN DE VELD: I believe it raises it up to  
4 level 30.

5 (Pause.)

6 Yes, it would be level 30.

7 THE COURT: All right. Go ahead.

8 MR. VAN DE VELD: The government's position  
9 paper with regard to sentencing suggests that all of  
10 the conduct that was alleged against the defendant is  
11 true. It thereby says that you should give a two-level  
12 enhancement to the guidelines as Mr. Elm having been an  
13 organizer of the group and the leader of the activity.

14 That would be completely inconsistent with the  
15 jury's verdicts in this case, there being 12 verdicts  
16 for which he was completely acquitted. Those, the  
17 evidence in reliance upon those verdicts was the  
18 testimony of Eric Aponik, John V. Cruz, Jonathan  
19 Canovas, and that testimony related that Mr. Elm  
20 was the person who was responsible for leading the  
21 activity. That was the basis of him being the person  
22 responsible for the money laundering charges.

23 The testimony was that Mr. Cruz would sell the  
24 drugs, Mr. John V. Cruz would sell the drugs, return  
25 the money to Brian, and Brian would give the money to

1 Eric Aponik, and Eric Aponik would then take the money  
2 and wire it to Jonathan Canovas based upon the  
3 arrangements between all of them.

4 The jury didn't accept that testimony as true.  
5 And because it didn't accept that testimony as true,  
6 and it -- it returned a verdict of not guilty as to  
7 those charges, it would be completely inconsistent with  
8 giving honor and respect to the jury's verdicts to then  
9 turn around after the verdicts had been rendered and  
10 assume those facts to be true for purposes of  
11 sentencing.

12 So I ask the court to not accept the offense  
13 conduct as it was previously described prior to trial,  
14 and as it was included in the offense conduct in the  
15 presentence report, because to do so will ignore the  
16 fact that the jury not only spent a week listening to  
17 the evidence, but sat for another week deliberating on  
18 the evidence before reaching a verdict.

19 I'm sure that the court understands they  
20 spent -- well, in Guam, a week of deliberation is a  
21 rather long period of time. It may not be a long  
22 period of time for deliberations in the state of  
23 Washington, but here, most deliberations usually take  
24 a day. Anything longer than that is usually fairly  
25 long. And I think that in this particular case,

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1 deliberations were long and reflects the fact that the  
2 jury approached this in a very deliberative manner.

3 I've tried to be in a position to counsel  
4 my client on his ability to obtain acceptance of  
5 responsibility. The presentence report suggested  
6 he should not receive a credit for acceptance of  
7 responsibility. I urge the court not to consider  
8 giving him the -- I ask the court to give him the  
9 acceptance of responsibility and not consider the  
10 position that he didn't accept responsibility as  
11 contained within the presentence report, because he  
12 asked me to provide for him an idea of what it was was  
13 the basis for the jury returning its verdict of guilty  
14 in the middle range of the three quantity levels in the  
15 special interrogatory included in the verdict. I'd  
16 like to think of myself to be a fairly intelligent  
17 person, and I really tried to consider the evidence in  
18 this case as to how it is they may have reached that  
19 verdict, and I could only come up with two particular  
20 pieces of evidence that I thought might have supported  
21 the verdict.

22 One was the testimony of Jarrett Elm which  
23 talked about him having arrived at the warehouse in  
24 August of 2004 and had seen Eric Aponik and Brian  
25 sitting at a table, and that some ice was on the table

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1 in a baggie--he didn't know how much--and they were  
2 dividing it up, according to Jarrett, for sale. The  
3 other would have been the testimony of Brian himself  
4 when he was on the witness stand and talking about when  
5 he had been arrested previously and he had -- there had  
6 been a gun in his backpack as well as some amount of  
7 methamphetamine. But it's clear to me that the jury  
8 rejected all of the other evidence indicating the  
9 defendant's guilt.

10 So, I was trying to surmise for him which  
11 would be the facts, but then after that I said, "you  
12 know, frankly, I'm not sure". I know that the  
13 acceptance of responsibility requires Brian to  
14 acknowledge his criminal activity, but if I can't  
15 figure out for him and assist him in determining what  
16 those facts are, I don't think that it's fair to place  
17 the burden upon him to try to do it himself. And so,  
18 because of my inability to ascertain what facts, I am  
19 not able to counsel and advise him as to what it is he  
20 needs to admit or not to admit.

21 So we discussed it prior to meeting with the  
22 probation officer in the preparation of the presentence  
23 report, and we came to the conclusion that since I  
24 couldn't figure out what to advise him was the conduct  
25 that he needed to admit, that the best alternative

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1 would have been simply to say that we can't figure it  
2 out. Whatever it is that he has done wrong, he has  
3 admitted. In fact, during the course of his testimony,  
4 he admitted the things that he had -- he had actually  
5 done and those things that he hadn't done.

6 So, I think that the burden that probation  
7 tries to place upon Brian in order for him to qualify  
8 for acceptance of responsibility is a grossly unfair  
9 burden, because Brian is an intelligent young man, and  
10 I don't mean to sound conceitful in saying so, but I  
11 don't think that he's quite as educated or intelligent  
12 as I am, and yet I'm unable to provide him with the  
13 advice that he needs. And maybe the court through its  
14 recollections might have an idea of what it is that the  
15 jury based its verdict upon. And it may be I'm just  
16 not as intelligent as the court, but I still think that  
17 these are circumstances that if -- maybe if he had  
18 someone more intelligent than I as his counsel, he  
19 might be in a position to be able to admit those facts.

20 So, I ask the court in computing the results  
21 under the Sentencing Guidelines to give him the  
22 acceptance of responsibility. I think that the --

23 THE COURT: That really kind of puts me in a  
24 tough spot, because it asks me to give him credit for  
25 accepting responsibility when he's saying in essence

1 that, well, I don't know how to accept responsibility  
2 because I don't know what I did that the jury didn't  
3 like. It would make it a lot easier for me if he were  
4 to say that "I did deal in sufficient methamphetamine  
5 to warrant the jury's verdict as to the middle range".

6 MR. VAN DE VELD: Well, Your Honor, I think he  
7 admitted that he had been involved in drug dealing when  
8 he testified on the witness stand. I think he  
9 acknowledged that, but he indicated that he had nothing  
10 to do with Eric Aponik --

11 THE COURT: Well, setting aside Eric Aponik,  
12 does he admit that he did, that he dealt in sufficient  
13 quantities of methamphetamine to justify the jury's  
14 verdict as to the middle range?

15 MR. VAN DE VELD: I believe he would accept  
16 that he did so.

17 THE COURT: Is that true?

18 THE DEFENDANT: Yes, Your Honor.

19 THE COURT: All right.

20 MR. VAN DE VELD: But my point was I couldn't  
21 figure out the specific facts --

22 THE COURT: I hear you, I hear you. And I  
23 accept your reasoning, and I'll hear from Ms. Johnson,  
24 she'll probably turn me around on this, but I accept  
25 your reasoning that it would be unfair to require him

1 to accept responsibility by pleading guilty to a bunch  
2 of counts that he didn't feel he was guilty of, and  
3 that the jury acquitted him on. That portion of your  
4 argument I find very persuasive. And with his  
5 additional admission, I'm reasonably satisfied that  
6 he's entitled to the two-level reduction.

7 MR. VAN DE VELD: Thank you, Your Honor. The  
8 five to 50 grams, the reason that I urge the court to  
9 adopt the low end of the quantity range, and I  
10 understand that --

11 THE COURT: I guess where I come down on that  
12 is, first of all -- and I'll hear you out on this --  
13 but my thinking, my current thinking is that he was the  
14 beneficiary of some good lawyering and a sympathetic  
15 jury that was willing to give him the benefit of the  
16 doubt on the quantities. And, frankly, he got a very  
17 big break from the jury, I think, when they acquitted  
18 on 12 of the counts. And he ought to be quite happy  
19 with the verdict.

20 MR. VAN DE VELD: I can understand Your Honor  
21 feeling that way. I guess maybe it's my humility that  
22 I don't take the position that the jury returned its  
23 verdict because of my lawyering skills, but more  
24 because of the proof. And, you know, I think I do a  
25 decent job as a lawyer, but I don't think that that was

1 the sole reason that they rejected the government's  
2 case. I think they rejected the government's case  
3 because of problems with the proof, and --

4 THE COURT: And that's a valid observation.  
5 I think that it's probably not in contest that there  
6 were weaknesses in some of the aspects of the  
7 government's case.

8 MR. VAN DE VELD: And so based on that, I  
9 think that if we -- if we just look, you know, at the  
10 verdict itself, and we look at the range that is  
11 provided in there, the question is which, which amount  
12 in that range would they have been absolutely -- would  
13 they have felt met the proof beyond a reasonable doubt  
14 standard. Because, unfortunately because the  
15 sentencing guidelines break things into two different  
16 levels between the amounts involved, maybe three  
17 different levels, it's -- we're not certain as to which  
18 level it is that they actually found. We gave them the  
19 ranges based upon the mandatory minimum requirements  
20 within the statute, and that's how the interrogatory is  
21 posed to them. But within that middle range, there is  
22 a breakdown of ranges based upon the sentencing  
23 guidelines. So which level can we be certain that they  
24 found beyond a reasonable doubt? Well, the five grams  
25 is the minimum amount, but where along the line up to

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1 50 do we start having problems?

2 THE COURT: If it were 50 grams, assuming  
3 you get a two-level reduction for acceptance of  
4 responsibility and a criminal history category of IV,  
5 that would give a -- start with a base offense level of  
6 30, a reduction of two for acceptance of responsibility  
7 would give a total offense level of 28. That's  
8 assuming the high end of the range, which will give a  
9 guideline range of 135 to 168.

10 If you accept your argument of a minimum, the  
11 minimum five grams, you start with a base offense level  
12 of 26, less two for acceptance of responsibility, with  
13 a criminal history category of IV, will give a  
14 guidelines range of 77 to 96 months.

15 If you pick the mid-range, that is, add two to  
16 the bottom, the five-gram base offense level, that will  
17 give you a base offense level of 28, less two for  
18 acceptance of responsibility, would give you a total  
19 offense level of 26, with a criminal history category  
20 of IV, gives a guideline range of 92 to 115 months.

21 So one way to reason yourself to a conclusion  
22 if you feel wed to the guidelines, which I don't, would  
23 be then a mid-range of the middle verdict range of 92  
24 to 115 months.

25 MR. VAN DE VELD: Thank you. And, Your Honor,

1 I agree with you, and those are the -- the reason that  
2 I go through these arguments is because the sentencing  
3 law following *Booker*, *Fanfan* and *Emeline* indicates that  
4 we must first derive what the actual guideline  
5 application should be, because that's to be considered  
6 overall in sentencing. Then the court is free to use  
7 that simply as a recommendation to the court as to what  
8 sentence it should impose, and it's only restricted by  
9 the mandatory minimums and the actual maximums under  
10 the statute in imposing sentence.

11 THE COURT: And the factors of 18 USC, 3553.

12 MR. VAN DE VELD: Correct. And that then  
13 leads me to the second part of what it is that I wanted  
14 to say on behalf of my client, which is relative to how  
15 the court should sentence him. I think the court  
16 firmly grasps the arguments that I have raised  
17 concerning the guidelines, so I won't belabor those  
18 any further. What I'd like to do is point out a little  
19 bit about Brian and his life.

20 Brian has a history of having committed  
21 crimes, that's why he has a criminal history category  
22 other than I. Brian lacked a real adult father figure  
23 in his life most of his upbringing, and Brian got  
24 involved in doing things with his friends in school  
25 that led to him having left school early and not

1 completing high school. When he was sentenced on  
2 most of his offenses, other than the first time that  
3 he served sometime in a federal facility, he goes to  
4 serve time, but there are no rehabilitation programs  
5 that are made available for him. The one time that  
6 rehabilitation programs were made available for Brian  
7 was a very short period of time that he served, and  
8 during that period of time, Brian completed his GED.

9 I suppose it's only based upon my personal  
10 knowledge of Brian that--and it's not evidence that  
11 I can offer to the court--but I don't see Brian as the  
12 kind of person who has ill intent or is the kind of  
13 individual who wants to harm anyone. He doesn't, he  
14 does not appear to me to have a malicious intent at all  
15 in any respect. I think he's, he's basically gotten  
16 involved in the activities that he has gotten involved  
17 in because of his associations, his friends, and in  
18 pursuit of financial support.

19 Brian is, whatever period of time Your Honor  
20 will sentence him to, Brian is going to be in a  
21 facility where he's going to spend a considerable  
22 period of time in prison. And during that period  
23 of time Brian will make use of that time to better  
24 himself. I think that Brian understands this, this  
25 period of imprisonment has taken from him being able

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1 to be a father to his own son, and made it so that he  
2 cannot fulfill the obligations that he feels to his  
3 son and to the woman that he has been in love with for  
4 a great many years, Keomi Lujan, who testified at  
5 trial. And now he knows that he won't be there for  
6 some of the most significant events in their lives.  
7 And it has, I think it has had a significant and  
8 profound effect upon him.

9 So for those reasons, Your Honor, I ask Your  
10 Honor to sentence Brian with as much leniency as Your  
11 Honor feels that you, in your good conscience, can do  
12 so because I do think that he will make good use of the  
13 time that he does serve so that when he is able to be  
14 released, he will be able to be a productive member of  
15 the community, and I hope will no longer engage in  
16 criminal conduct.

17 Thank you, Your Honor.

18 THE COURT: Does your client wish to say  
19 anything?

20 MR. VAN DE VELD: I believe he does, Your  
21 Honor.

22 THE COURT: All right. Step up to the  
23 lectern. Go ahead.

24 THE DEFENDANT: Thank you, Your Honor.

25 First of all, can I acknowledge my son?



1 THE COURT: Sure.

2 THE DEFENDANT: Son, I want you know that I've  
3 been going through this for a long time.

4 COURT REPORTER: I can't hear him, Your Honor.

5 THE COURT: You'll have to speak up, Mr. Elm.

6 THE DEFENDANT: I've made a lot of bad  
7 mistakes in my life in the past that I'm going to pay  
8 for today. It's very important to me that you listen  
9 to your mother, stay in school, choose your friends,  
10 stay away from drugs, and don't do the things that will  
11 get you in trouble. Please understand that this is the  
12 reason why I am being punished, because of my past and  
13 the wrong decisions that I have made.

14 Son, I'm very sorry that I won't be out there  
15 with you for a long time, and I'm sorry for all the  
16 things I'm going to miss in the years to come. But I  
17 promise you when I get out, I will make it up to you  
18 when I come home. Please understand that I love you,  
19 and I only want the best for you. I'm telling you this  
20 because I don't want you to go through the things that  
21 I'm going through today. Be strong, son, just hang in  
22 there.

23 Keomi, I'm sorry that things ended up this  
24 way. And I'm sorry for putting you through all this  
25 pain and suffering. I'm sorry that I wasn't around

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1 when you most needed me. And I'm sorry for not being  
2 out there to help you with our son. Most of all, I'm  
3 sorry that I won't be able to do all these things for  
4 a while.

5 Thank you for the encouragement, the comfort,  
6 the patience, the support, the loyalty, understanding  
7 and the love that you have given me throughout these  
8 hard times. I thank you for believing that I can  
9 change, and that things could get better. I thank you  
10 for you just being you. You're a wonderful person that  
11 everybody loves, and like a magnet to everyone. You  
12 are the strongest person I know. I cannot express how  
13 grateful I am for a person like you to be by my side.  
14 You are the best -- you and Keanu are the best things  
15 that ever happened to me in my life, and I'm very  
16 fortunate that I caught your attention.

17 I hope that you find it in your heart to  
18 forgive me for failing you and Keanu, and I'm hoping  
19 that the both of you can give me a chance to make  
20 things better in the future. I promise that I would  
21 never jeopardize us again.

22 THE COURT: Anything else?

23 THE DEFENDANT: Your Honor, after the trial  
24 I spoke to Mr. Van de Veld and I asked him what was the  
25 evidence of my conviction, because I couldn't figure

1 it out, how the jury arrived with five to 50 grams.  
2 Mr. Van de Veld said he couldn't figure it out either.  
3 If I was to know how the jury was able to reach that  
4 verdict, I would have admitted my guilt. Your Honor,  
5 I've been in trouble for a long time with the law, I've  
6 made a lot of wrong decisions in my life that led to  
7 the loss of my freedom, but I always admitted my guilt.

8 I didn't take the steps to stay out of  
9 trouble, but I won't let that happen again. I can be a  
10 better person, a better father to my son. I can live  
11 without drugs or getting into trouble. I just want to  
12 get through this, and be out there with my family to  
13 support them. Please, recommend that I take vocational  
14 studies so that it will help me find a good job when I  
15 get out.

16 All I'm asking today, Your Honor, is to  
17 sentence me with leniency. Thank you.

18 THE COURT: All right. Ms. Johnson?

19 MS. JOHNSON: May it please the court. Thank  
20 you, Your Honor, for coming back to Guam. You're the  
21 one who heard the trial, and you've saved Mr. Van de  
22 Veld and myself hours of having to recount to another  
23 trial judge what our recollection of the case was, and  
24 arguing the evidence back and forth.

25 THE COURT: And believe me, if I had the

1 choice, I would have let you spend the hours rather  
2 than me spending 13 hours on an airplane each  
3 direction.

4 MS. JOHNSON: Well, I thought a telephonic  
5 conference would accomplish it; in other words, it's  
6 not my fault you're back here. But certainly I think  
7 that it helps to have the trial judge do the  
8 sentencing.

9 Concerning the presentence report, the  
10 government filed a strong objection to it. It's as  
11 if the trial had not occurred when you read the  
12 presentence report. It does not take into account any  
13 of the testimony, that the defendant was the one who  
14 started this ring, that he recruited his brother-in-  
15 law, that he had John Cruz selling for him, that he was  
16 the one dealing with the people in Las Vegas, the one  
17 talking to them. He should receive a four-level  
18 increase as the organizer and the leader of this  
19 activity.

20 It does not surprise me that the jury returned  
21 the verdict it did, because when this case was broken  
22 in June of 2005, the defendant was in jail. And the  
23 one hundred grams that Mr. Aponik and Mr. Espinosa were  
24 bringing in is not the way they started out. Initially  
25 they started out in October--you may recall the

1 defendant got his own cell phone then and made hundreds  
2 of calls after that--that they were bringing in two to  
3 five gram quantities at a time in greetings cards. And  
4 that I think is what the jury convicted him of, the  
5 three to five gram quantity that went on in October,  
6 November, December and January. And of course you  
7 can't tell exactly how many there were, and that's why  
8 they settled on that middle range. I don't see that  
9 incongruous or unreasonable at all.

10 The point is that this man was charged in  
11 Count One with the conspiracy that he was charged with,  
12 and that is, what occurred between June of 2004 and  
13 June of 2005, not some other case, not his prior drug  
14 dealing before then, but this particular case.

15 He got on the stand and he flatly denied  
16 everything that the witnesses were saying. He said he  
17 got his own cell phone so that he and his wife could  
18 talk to each other. He denied using drugs at all. He  
19 called his Superior Court probation officer to say that  
20 he had tested clean throughout this entire period of  
21 time, and he denied using or dealing any ice at all  
22 during the period of time that this indictment  
23 concerned. I'm going now towards his acceptance of  
24 responsibility. This was under oath. Is he now saying  
25 that in fact his testimony at trial was false? Because

1 that is the only way that he can get acceptance of  
2 responsibility. For him -- it's not clear to me what  
3 this admission is.

4 Counsel said that he's done ice at some time.  
5 This is the trial and this is what counts. And if his  
6 testimony under oath is to be taken into effect, then  
7 he's innocent and there's nothing for him to accept.  
8 So that I think is an important question. Is he saying  
9 that his testimony under oath was false?

10 I think that the testimony stands as it is,  
11 the exhibits stand as they are, that this man started  
12 this operation with three to five gram quantities, and  
13 he should be held accountable for that.

14 Thank you.

15 THE COURT: All right. Let me start by saying  
16 that despite Mr. Elm's criminal background and the fact  
17 that he scores high on the criminal history category, I  
18 don't conclude that he's an evil person. Nobody could  
19 be totally bad and have the support of the spouse that  
20 Mr. Elm enjoys, and have raised a son that's impressive  
21 as your young son, Mr. Elm.

22 It does need to be said, though, that one of  
23 the things that is very apparent to me is that this  
24 island has a very serious problem with methamphetamine,  
25 even more of a problem than we have in the mainland.

1 I don't know why, but it does seem to be more pervasive  
2 here than in some other sections of the United States.

3 The other thing that is apparent to me is  
4 that young people who don't have the background and  
5 experience of somebody such as myself with over 25  
6 years of dealing with the drug business, they don't  
7 understand how serious methamphetamine is. Those of  
8 us who've been around as long as I have have dealt with  
9 all sorts of drugs, including Angel Dust, and LSD, and  
10 crack cocaine and flake cocaine and heroin, Ecstasy, but  
11 the methamphetamine is just about as bad as I've had to  
12 deal with in terms of its addictive qualities, its  
13 impact upon people's cognitive abilities and their  
14 physical bodies. And one of the serious problems with  
15 it is that it's so inexpensive, and young people don't  
16 really seem so think that there's anything that bad  
17 about it. It's kind of like marijuana, it seems, when  
18 in fact -- and they get a mixed message. I mean, we  
19 have military pilots who use methamphetamine to stay  
20 alert in the cockpit, and the message one gets from  
21 that is, well, maybe if the government hands it out to  
22 pilots, it's not that bad a deal. But it is.

23 So, in formulating a sentence that seems to me  
24 that trying to balance the good things about Mr. Elm  
25 against the bad things of what he did, and this drug

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1 traffic, makes the formulation of a sentence extremely  
2 difficult.

3 I begin with the guidelines calculations, and  
4 I'm concluding that the best way to approach it is to  
5 assume the mid range of the jury's verdict range, which  
6 would then give a base offense level, as said earlier,  
7 of 28. Giving the defendant credit for acceptance of  
8 responsibility, and I agree it's a close question, and  
9 not a slam dunk, but on the other hand, I think that  
10 when you're confronted with pleading guilty to a number  
11 of counts that you don't feel you're guilty about, and  
12 the jury concluded that he wasn't guilty of a number of  
13 counts, it's not fair to refuse to give acceptance of  
14 responsibility to a defendant that's confronted with  
15 that kind of a dilemma, so I'm giving him credit for  
16 acceptance of responsibility, which gives a total  
17 offense level of 26, and with a criminal history  
18 category of IV, would give a guideline range of 92  
19 to 115 months.

20 Beginning with that guideline calculation, and  
21 then considering the factors of 18 USC, Section 3553,  
22 particularly trying to arrive at a sentence that is  
23 sufficient but not excessive to give credit for the  
24 seriousness of the offense, the seriousness of the  
25 problem confronted by the District of Guam, the need

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1 to deter others from getting involved in this business,  
2 but also giving the defendant credit for his parental  
3 responsibilities and trying to get him back to his  
4 family as soon as possible, I conclude that the  
5 appropriate sentence is a period of confinement of  
6 84 months, and a period of supervised release of four  
7 years to commence upon the defendant's release from  
8 confinement, subject to the standard conditions as set  
9 forth in the recommendation of the probation office,  
10 except that I'm not imposing the 300 hours of community  
11 service. I understand that's been the history of this  
12 district in the past; I just don't think it's necessary  
13 to burden the defendant with that.

14 You're required to pay the special assessment  
15 for the count of conviction of one hundred dollars.

16 Mr. Elm, you may have a right to appeal this  
17 sentence. If you wish to file a notice of appeal, it  
18 must be filed within 10 days of today. If you wish the  
19 assistance of an attorney in filing a notice of appeal  
20 and cannot afford one, one will be appointed to assist  
21 you if you so request. If you wish the assistance of  
22 the clerk in filing a notice of appeal, she will assist  
23 you if you so request. Do you understand?

24 THE DEFENDANT: Yes, Your Honor.

25 THE COURT: And I'd like to leave you with one

1 other thought, Mr. Elm, and that is, I was very moved  
2 by your comments to your son. And I would suggest that  
3 your commitment to him that you not engage in conduct,  
4 when you get out, that would again put your family in  
5 jeopardy is a very solemn and sacred commitment, more  
6 important than anything you say to me. And I hope that  
7 you, when you get out, that you remember what you said  
8 to your son, and that you are able to look him in the  
9 eye when you get out and say, "I lived up to my promise  
10 to you". All right?

11 Anything further?

12 MR. VAN DE VELD: Your Honor, concurrent or --

13 THE COURT: Yes.

14 MR. VAN DE VELD: -- to this present sentence?

15 THE COURT: Yes.

16 MR. VAN DE VELD: Thank you.

17 And one last thing, Your Honor. Could the  
18 court make a recommendation that he be returned to  
19 Lompoc?

20 THE COURT: Yes.

21 MR. VAN DE VELD: Thank you.

22 THE COURT: Oh, yes. And I should state for  
23 the record, I'm waiving a fine due to the defendant's  
24 financial condition.

25 MR. VAN DE VELD: Thank you.

1 THE COURT: All right. Thank you, counsel.

2 THE DEFENDANT: Thank you, Your Honor.

3 (Proceedings concluded.)

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6  
7 CERTIFICATE OF REPORTER

8  
9 CITY OF AGANA )  
10 ) ss.  
11 TERRITORY OF GUAM )

12 I, Wanda M. Miles, Official Court Reporter  
13 of the District Court of Guam, do hereby certify the  
14 foregoing pages 1-27, inclusive, to be a true and  
15 correct transcript of the shorthand notes taken by me  
16 of the within-entitled proceedings, at the date and  
17 time therein set forth.

18 Dated this 11th day of October, 2006.

19  
20 Wanda M. Miles

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Wanda M. Miles  
Official Court Reporter  
District Court of Guam